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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 713

PARKE, DAVIS AND COMPANY,
Appellant,

vs.

J. EUGENE COOK, STATE REVENUE COMMISSIONER

APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

T. GRADY HEAD,
Attorney General;
CLAUDE SHAW,
Assistant Attorney General;
VICTOR DAVIDSON,
Assistant Attorney General,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

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PARKE, DAVIS AND COMPANY,
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J. EUGENE COOK, STATE REVENUE COMMISSIONER,
Appellee

APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT OF STATE SUPREME COURT

Now comes J. Eugene Cook, Commissioner of Revenue of the State of Georgia, Appellee in the above styled case, and within fifteen days after being served with Appellant's appeal, moves the Court to dismiss said appeal pending from the Supreme Court of Georgia to this Honorable Court on the following grounds:

1

There is no substantial Federal question involved in this case which requires this Court to take jurisdiction of the controversy.

2

The Supreme Court of Georgia has correctly decided all issues in this case in accordance with State and Federal law.

Respectfully Submited, This November 15, 1944,

T. Grady Head,
Attorney General;
Claude Shaw,
Asst. Atty. General;
Victor Davidson,
Asst. Atty. Gen.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 713

PARKE, DAVIS AND COMPANY,
Appellant,

vs.

J. EUGENE COOK, STATE REVENUE COMMISSIONER,
Appellee

APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF BY THE ATTORNEY GENERAL OF GEORGIA IN SUPPORT OF MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT OF STATE SUPREME COURT

The decision rendered by the Supreme Court of Georgia in this case definitely upholds the right of the State to levy a nondiscriminatory tax on net income derived from sales made within the State, even though the merchandise or goods are eventually shipped out of the State in interstate commerce. This ruling and adjudication of the Supreme Court of Georgia is clearly authorized by numerous decisions rendered by this Court. See,

Underwood Typewriter Company v. *Chamberlain,* 65 L. ed. p. 165;

United States Glue Company v. *Oak Creek,* 62 L. ed. p. 1135;

Charles B. Shaffer v. *Carter,* 64 L. ed. p. 445.

The decisions of this Court are uniform to the effect that a State may levy a nondiscriminatory tax on net income derived from transactions arising in interstate commerce. In *Charles B. Shaffer* v. *Carter, supra,* this Court held:

> "(7) A state income tax upon the net income of a nonresident from the business carried on by him in the state is not a burden on interstate commerce merely because the products of the business are shipped out of the state, since the tax, not being upon gross receipts, but only upon the net proceeds, is plainly sustainable even if it includes net gains from interstate commerce."

The Supreme Court of Georgia in its decision takes the position that the Income Tax Act of this State only taxes net income of nonresidents which is properly apportioned to business transactions occurring in this State as announced in the United States Supreme Court decisions above referred to. An examination of the Georgia statute will reveal that the State Supreme Court is correct in this decision. Section 92-3102 of the Georgia Code provides in part as follows:

> "The tax imposed by this law shall apply to the entire net income, as defined herein, received by every domestic corporation, and every foreign corporation owning property or doing business in this State:
>
> "If the entire business income of the corporation is derived from property owned or business done in the State, the tax shall be imposed on the entire business income, but if the business income of the corporation is derived in part from property owned or business done in the State and in part from property owned or business done without the State, the tax shall be imposed only on the portion of the business income reasonably attributable to the property owned and

business done within the State, to be determined as follows:

(c) Where income is derived from the manufacture or sale of tangible personal property, the portion thereof attributable to business within the State shall be taken to be such percentage of the total of such income apportionable to Georgia determined as follows:

(1) Tangible property * * *

(2) Manufacturing cost ratio * * *

(3) Sales ratio. The ratio of the total sales made through or by offices, agencies, or branches located in Georgia during the income year to the total net sales made everywhere during said income year. The tangible property ratio, the manufacturing cost ratio, and the sales ratio being separately determined and the three percentages averaged."

"The words 'sale or sales' wherever appearing in Part 9 of this Title for the purpose of apportioning net income to Georgia shall be deemed to be the total value of all sales made through or by the offices, agencies, or branches located within this State, regardless of the destination."

The State contends that the application of the above statute to the facts of this case is not an unconstitutional burden on interstate commerce. The Act in question only seeks to tax net income derived from business transacted in this State or from property located herein. Several other Georgia cases have definitely established this fact.

Montag Bros., Inc. v. *State Revenue Commission,* 50 Ga. App., p. 660;

Interstate Bond Company v. *Revenue Commission,* 50 Ga. App., p. 744.

We believe that this Court will not question the decisions rendered by the Georgia Supreme Court interpreting the

income tax statutes of this State unless it is clearly shown by Appellant that these decisions violate some constitutional right of the Appellant. It seems that it would be necessary for Appellant to actually show that the tax statute in question as applied by the State of Georgia resulted in the State taxing property beyond its jurisdiction, or discriminated against Appellant because it was engaging in interstate commerce. In the record, Appellant nowhere establishes the proposition that the use of the formula in question exacts an undue interference with its interstate business.

In *General Trading Company* v. *State Tax Commission*, No. 441, October Term, 1943, decided May 15, 1944, by this Court, it was held:

> "While no state can tax the privilege of doing interstate business, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce, does not exempt it from state taxation, so long as such taxation is not obviously hostile or practically discriminatory toward such commerce."

In *U. S. Glue Company* v. *Oak Creek*, 62 L. Ed., p. 1135, it was held:

> "A state, in levying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce, without contravening the commerce clause of the Federal Constitution, where there is no discrimination against interstate commerce either in the admeasurement of the tax or in the means adopted for enforcing it."

On page 1141 of the Opinion the Court states:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, rec-

ognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude, and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the Federal Constitution because they happen to be engaged in commerce among the states."

In *Underwood Typewriter Company* v. *Chamberlain,* 65 L. ed. p. 165, it was held:

"(1) State taxation of a foreign manufacturing and trading corporation, measured by the net profits earned within the state, does not offend against the commerce clause of the Federal Constitution, whether deemed a property tax or a franchise tax, even though these profits may have been derived in part, or indeed mainly, from interstate commerce where payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate business, but its enforcement is left to the ordinary means of collecting taxes."

"(3) Measuring for tax purposes the net profits earned by a foreign manufacturing and trading corporation within the state by taking such proportion of the whole net income as the fair cash value of the corporation's real and tangible personal property within the state bears to the fair cash value of all the real and tangible personal property of such corporation cannot be said to be so inherently arbitrary, nor, as applied to a corporation whose profits were largely earned in a series of transactions, beginning with manufacture in the state, and ending with sale in other states, to produce so unreasonable a result, as to render invalid the state law prescribing such rule, as taxing business outside the state, and hence denying due process of law, where the only showing made in support of this constitutional objection is that but a very small part of the corporation's net profits was received within the state, while, under the statutory method of apportionment, nearly one half of the corporation's net income is attributable to operations within the state, since the percentage of net profits earned within the state may, none the less, have been even larger than the percentage arrived at by the statutory method."

In 130 A. L. R. 1188, the rule relative to this subject is stated:

"Although a state may not constitutionally tax the income of a nonresident or a foreign corporation derived from sources outside of the taxing state (see Hans Rees Sons vs. N. C. 283 U. S. 123), it may tax the income of a nonresident or a foreign corporation derived from property or business transacted within the State."

In the *Hans Rees* case, the taxpayer sustained the burden of showing that the State by the application of its stautory method of application was taxing business transacted outside the State. Taxpayer showed that the income having its source in manufacturing and tanning operations in

North Carolina was 17%, while the amount allocated to North Carolina by the statutory method was approximately 80%. However, this same statutory method of allocation was subsequently upheld in *Maxwell* v. *Kent Coffee Company*, 204 N. C. 365, 90 A. L. R. 476, and affirmed by the United States Supreme Court in 78 L. ed. p. 1040, on the ground that the case was controlled by the decision in the *Underwood Typewriter Company* case (See page 1211 of 130 A. L. R.).

In a recent case decided by the United States Supreme Court on May 29, 1944, entitled *International Harvester Company* v. *Wisconsin Department of Taxation* (No. 620, October Term, 1943), it was held:

> "A state may constitutionally tax such part of the income of a nonresident as is fairly attributable either to property located in the state or to events or transactions which, occurring there, are subject to state regulation and which are within the protection of the state."

The above stated case definitely shows that the State of Georgia is entitled to levy a tax on the net income derived from transactions or events which occur in this State. In this connection it should be noted that our Income Tax Act places a tax on NET income. In other words, before any apportionment takes place the net income of the taxpayer must first be computed. The taxpayer in his amendment clearly agrees with this proposition. In Paragraph 13 of the amendment taxpayer states that the income tax act is unconstitutional "because the same requires plaintiff to pay a NET income tax on account of manufacturing done in other States and business done in other States and in interstate commerce." We place the word "net" in large letters in order to show that our tax is based on net income rather than gross income.

Recently however, the courts have become more liberal in allowing states to levy a tax on gross income derived from interstate commerce transactions. In *International Harvester Company* v. *Department of Taxation,* decided May 15, 1944, by the United States Supreme Court, it was held:

> "Where a state seeks to tax gross receipts from interstate transactions consummated within its borders, its power to do so cannot be withheld on constituional grounds where it treats wholly local transactions the same way."

In this case there were three distinct types of transactions involved which were designated by the Court as follows:

> "Class C: Sales by branches located outside Indiana to dealers and users residing in Indiana. The orders were solicited in Indiana and the customers took delivery to themselves at the factories in Indiana to save time and expense of shipping.
>
> "Class D: Sales by branches located in Indiana to dealers and users residing outside of Indiana in which the customers came to Indiana and accepted delivery to themselves in this state.
>
> "Class E: Sales by branches located in Indiana to dealers and users residing in Indiana, in which the goods were shipped from points outside Indiana to customers in Indiana, pursuant to contracts so providing."

"The objections under the Commerce Clause and the Fourteenth Amendment to the tax on the receipts from the three classes of sales involved here are equally without merit.

"In the Wood Preserving Corporation Case contracts were made outside Indiana for the sale of railroad ties. The respondent-seller, a Delaware corporation with its principal place of business in Pennsylvania, obtained the ties from producers in Indiana and delivered them to the

buyer (Baltimore & Ohio Railroad Co.) in Indiana who immediately loaded them on cars and shipped them out of the State. Payments for the ties were made to the seller in Pennsylvania. We held that Indiana did not exceed its constitutional authority when it laid the tax on the receipts from those sales.

"We see no difference between the sales in the Wood Preserving Corp. Case and the Class C sales in the present one which is translatable into a difference in Indiana's power to tax. The fact that the sales in Class C are made by an out-of-state seller and that the contracts were made outside the State is not controlling. Here as in the Wood Preserving Corp. Case, delivery of the goods in Indiana is an adequate taxable event. When Indiana lays hold of that transaction and levies a tax on the receipts which accrue from it, Indiana is asserting authority over the fruits of a transaction consummated within its borders. • • • The Class D sales are sales by an Indiana seller of Indiana goods to an out-of-state buyer who comes to Indiana, takes delivery there and transports the goods to another state. The Wood Preserving Corporation Case indicates that it is immaterial to the present issue that the goods are to be transported out of Indiana immediately on delivery. Moreover, both the agreement to sell and the delivery took place in Indiana. Those events would be adequate to sustain a sales tax by Indiana."

The Court in the last Paragraph of this case sums up its conclusion as follows:

> "We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way."

In the present case the taxpayer does not accuse the State of discriminating against interstate transactions. Our In-

come Tax Act treats intrastate and interstate transactions in exactly the same manner. This principle of discrimination against interstate commerce by a state is very ably stated in

McGoldrick v. *Berwind-White Coal Mining Company* 84 L. ed. p. 565,

as follows:

> "State taxes whose tendency is to prohibit interstate commerce or place it at a disadvantage as compared or in competition with intrastate commerce, or which discriminate against interstate commerce, are unconstitutional."
>
> "It is not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens merely because an incidental or consequential effect of the tax is an increase in the cost of doing business by them."

The above case also definitely affirms several previous cases cited in holding as follows:

> "A tax may be levied on net income wholly derived from interstate commerce."

In the case of

Wood Preserving Corp. v. *Dept. of Treasury,* 85 L. ed. p. 1188,

it was held:

> "A tax laid under a state gross income tax act upon a foreign corporation in respect of a sale and delivery by it in the state to a railroad company of railroad ties, is not invalid under the Federal Constitution as laid upon income received outside the state, although the purchase price was paid to the seller at its principal place of business in another state.

> "The fact that goods which a foreign corporation resold in a state were purchased there by it through orders given from its office outside the state, cannot affect the authority of the state to tax the gross income of the corporation from the resale, even where their delivery to the corporation and its delivery to its customer were simultaneous."

The Court, in the above stated case, also states the following general rule:

> "The difficulty of making an exact apportionment is apparent, and hence, when the state has adopted a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases."

In the present case we believe that Section 92-3113 of the Income Tax Act in setting forth its formula showing the three ratios to be considered in apportioning income to the State of Georgia where the taxpayer does business both within and without the State is not unconstitutional. The plaintiff in this case fails to show or allege any facts which would indicate that the application of this formula as to its business is unreasonable and arbitrary. Certainly, the mere fact that the sales in question may be stated to be interstate transactions would not be sufficient to deprive the State of using such sales in its apportionment formula, particularly where only the net income is subject to tax.

It is true that in certain decisions the Supreme Court of the United States has held that where a tax is laid directly on gross income derived from interstate transactions, that such a tax is an undue burden upon such commerce. In *J. D. Adams Manufacturing Company* v. *Storen* 82 L. ed. 1365, an *Indiana* case where the tax was applied to gross receipts derived by an Indiana corporation from sales in other states, the Court held that since the tax was laid directly upon gross receipts derived from interstate com-

merce, the same was unconstitutional. To the same effect, see *Gwin, White and Prince* v. *Hinneford* 305 U. S. 434, where the tax was measured by gross receipts, and the court pointed out the risk of multiple taxation where the tax was not apportioned to the activities carried on within the State. We agree with the principle of law announced in these cases and recognize the fact that a state cannot levy a gross income tax on interstate transactions where the tax does not have any reasonable application to the business conducted in the taxing state. However, these decisions do not in anywise conflict with the principle of law which permits a state to levy a tax on net income derived from interstate transactions. There is no discrimination in the admeasurement of the tax.

The Supreme Court of Georgia definitely held that the sales in question took place in this State, since delivery of the merchandise to the common carrier took place in Georgia. This is the Georgia rule as pronounced by Section 96-107 of the Code of Georgia and so applied by the Supreme Court of this State in *Kehrer* v. *Stewart*, 117 Ga. p. 969, and *Mann* v. *Clauber*, 96 Ga. p. 795, in addition to the decision rendered by the Georgia Court in the present case. We feel that this Court will give great weight to what our Supreme Court has said in reference to where the sales in question actually took place. In fact, this Court has already affirmed this question in the recent case of *Murray B. McLeod* v. *J. E. Dilworth Company*, decided February 4, 1944, No. 311, October Term 1943, in which the Court held:

> "(1) A sales tax may not, in view of the commerce clause, be imposed by a state on sales to residents of the state which are consummated by acceptance of orders in, and the shipment of goods from, another state, in which title passes upon delivery to the carrier (distinguishing McGoldrick v. Berwind-White Coal Min. Co. 309 U. S. 33, 60 S. Ct. 388, 128 ALR 875, 84

ALR 565; Wisconsin v. J. C. Penney Co. 311 U. S. 435, 61 S. Ct. 246, 130 ALR 1229, 85 L. ed. 267.)"

This Court agrees with the Georgia Court in holding that the sale takes place where title passes, and that title passes where delivery is made to the carrier. Since the sales are actually consummated in Georgia, it seems to us that no Federal question involving interstate commerce can properly arise in this case. Neither can any question arise involving the Fourteenth Amendment to the United States Constitution, since the State of Georgia is not levying a tax on a transaction occurring outside this State. For this reason, we respectfully submit that this Court should not take jurisdiction of this case since no substantial Federal issues are involved. In this connection, see, *American Steel and Wire Co.* v. *R. A. Speed* 48 L. ed. p. 538, where it was held:

> "A state is not precluded by the commerce clause of the Federal Constitution from imposing a merchant's tax upon a nonresident manufacturing corporation which has selected a city of that State as a distributing point, and has secured a local transfer company to take charge of its products when shipped to that point, assorted them, stored them in a warehouse, and make delivery in the original packages to the customers of the manufacturer, either as expressly directed by it, or under general directions in favor of its recognized and approved customers, whose names were furnished to the transfer company, since, under such circumstances, the goods, when stored in the warehouse, were no longer in transit, but had reached their destination, and were held in the state for sale."

We also call the court's attention to a previous decision rendered by the Supreme Court of Georgia in the case of *State Revenue Commission* v. *Edgar Bros.* 185 Ga. p. 216, in which the facts were very similar to those in the present

case. In the *Edgar Bros.* case, the taxpayer, a nonresident, was mining clay in this State and sending it out of the State to be processed and thence sold. All of the operations outside of mining took place without Georgia. The taxpayer had no office or place of business in this State, and all expenses were paid from the principal office located in New Jersey. None of the clay was shipped to any point in Georgia or sold to any customer in this State. The Commissioner of Revenue sought to levy a tax against taxpayer based on the income earned in this State as defined by the Georgia Income Tax Act of 1929. The 1929 Act did not actually set up an apportionment formula as the Income Tax Act now under consideration does, so it became necessary for the Commissioner to make his own formula. The formula prescribed by the Commissioner however, was in keeping with the formula later enacted by the Legislature as set forth in this Brief under Section 92-3113, supra. The Supreme Court of this State on page 221 of the decision, held:

> "A State has the power to tax the income of its resident and domestic corporations, derived from transactions both within and without the State, where there is no discrimination against interstate commerce either in the admeasurement of the tax or in the means adopted for enforcing it. U. S. Glue Company vs. Oak Creek, 247 U. S. 321. As to nonresidents an income tax may be levied upon income received from property within the State; and the fact that it may require activities of skill and management outside of the State to bring the income to fruition does not by reason of the commerce clause of the Federal constitution deprive the taxing State of jurisdiction to tax income which arises in its borders, or as to nonresidents doing business in a State and whose business is of a unitary character, as that of the taxpayer in the instant case, a tax may be levied based upon the entire net income, but apportioned to that part of the net income attribu-

table to business done in the taxing State, where the enforcement of such tax is left to the ordinary means of collecting taxes."

The second headnote to this decision reads as follows:

"(2) By a proper construction of Section 3 of the Act of 1929, in its relation to the act as a whole, it imposes an income tax on non-resident corporations doing business in this State, based upon the entire net income of such corporations, but apportioned to that part of such income as is attributable to business done in this State."

The Appellant appealed the decision of the *Edgar Brothers* case to this Court on the grounds that the statute and its application as made by the courts of this State, placed an undue burden on interstate commerce and was also in violation of the Fourteenth Amendment to the United States Constitution. The Supreme Court of the United States dismissed this appeal. See, 303 U. S. 626; 82 L. ed. p. 1088.

The case now before the Court is simply a repetition of the objections made to the taxing statute in the *Edgar Brothers* case, and such objections have already been squarely passed upon by this Court.

We also respectfully call the Court's attention to an exhaustive annotation on this subject in 130 A. L. R., beginning with page 1183.

In conclusion, we believe that our motion to dismiss or affirm the judgment of the Supreme Court of Georgia should be sustained because of the following propositions:

1. Appellant states that the Georgia Tax Act is unconstitutional because as applied to him it levies a tax on transactions without the jurisdiction of this State. An analysis of the record in this case discloses that the sales in question all occurred within this State and were therefore subject to the apportionment for-

mula as provided for by the Income Tax Act. To the effect that the sales took place in this State because of the fact that the merchandise were delivered to either the customer or the common carrier for delivery in this State, see,

Section 96-107 of the Code of Georgia;
Kehrer v. *Stewart,* 117 Ga. p. 969;
Mann v. *Clauber,* 96 Ga. p. 795,

and the decision of this Court rendered on May 15, 1944, in the case of *Murray B. McLeod* v. *J. E. Dilworth Company,* which recognizes and sustains the Georgia law in holding that title passes upon delivery to the carrier, and that this is where the sale is actually consummated. Since it is definitely shown that the sale occurred in the State of Georgia, then how can it be said that the State has violated the Fourteenth Amendment of the United States Constitution in attempting to tax a transaction occurring outside the State of Georgia? We respectfully submit that as we view the record, there is no Federal question properly raised as to this point, or if such a question should be said to be raised, the decision of the Supreme Court of Georgia is correct and should be affirmed by this Court.

(2) Appellant states that the appeal should be allowed because the Georgia statute exacts an undue burden on transactions occurring in interstate commerce. In order to sustain this position, Appellant cites several cases where a State attempted to levy a tax on gross income derived from interstate commerce and a tax which necessarily hindered and discriminated against such commerce. We respectfully submit that none of these cases apply to the one now under discussion, since the Georgia Tax Act clearly levies a tax only upon "Net" income as has been frequently held by decisions of this Court. For a summary of cases dealing with this subject, see annotation in *130 A. L. R.,* beginning at p. 1183. Appellant also recognizes the fact that the tax in question is based upon

net income in his pleadings. (See Paragraph 7 of the amended petition which is a part of this record.)

Since the United States decisions are uniform to the effect that a State may impose a nondiscriminatory tax on net income derived from interstate commerce, it clearly appears that the Supreme Court of Georgia was correct in rendering the decision in this case. For this reason, we say, that no substantial Federal issue is involved, or if such issue should be involved, it has already been settled favorable to the State of Georgia in numerous United States decisions, and therefore the judgment rendered by our Supreme Court should be affirmed.

(3) As we understand the case, this Court will not again hear the arguments advanced by Appellant in the State Court to the effect that the Georgia Income Tax Act does not levy a tax on the transactions now under consideration. Since this question involves the interpretation of a State law, as we understand it, this Court will abide by the decision rendered by the Georgia Supreme Court in construing this statute. See,

General Trading Company v. *State Tax Commission,*

decided by the United States Supreme Court on May 15, 1944.

Respectfully submitted,

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